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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. ~~1761~~ 70-818

WILLIAM A. SMITH, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION, PINELLAS COUNTY, FLORIDA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 2, 1971.

Decisions Below

The rulings of the Federal District Court for the Middle District of Florida, Tampa Division, is appended hereto as Appendix A. The per curiam decision of March 2, 1971 of the Court of Appeals for the Fifth Circuit is appended hereto as Appendix B.

Jurisdiction

The decision of the Court of Appeals for the Fifth Circuit was entered on March 2, 1971. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

The questions presented are:

1. Whether the trial court properly concluded that school officials determined, pursuant to an overall faculty evaluation, which faculty members to dismiss in connection with faculty cutbacks attending school desegregation actions, when there was no tangible objective evidence showing that such an evaluation was in fact held.

2. Whether the overall faculty evaluation pursuant to which the petitioners were discharged from their positions, if such an evaluation was in fact conducted, was done in a racially discriminatory manner violative of the Equal Protection Clause of the Fourteenth Amendment.

3. Whether the trial court abused its discretion in failing to rule upon petitioners' pendent state claims that their dismissals violated rights secured to them under Florida's Teacher Tenure Act.

Statutes and Constitutional Provisions Involved

42 U.S.C., Section 1983.

The Fourteenth Amendment of the Constitution.

Section 231.36 Florida Statute.

Section 231.36 (2), Florida Statutes.

The Florida statutory provisions are set forth in Appendices "C" and "D".

Statement

This case involves the challenge of six black junior college instructors who were summarily discharged from their teaching positions at the St. Petersburg Junior College, St. Petersburg, Florida. The dismissals occurred at the close of the 1966-67 school year when the Gibbs/Skyway campus of the St. Petersburg Junior College was permanently closed. The petitioners had taught at the previously segregated Gibbs/Skyway campus. This facility was merged with the Junior Colleges' remaining two campuses, the St. Petersburg Campus and the Clearwater Campus. The student bodies and faculties of these latter campuses were primarily white.

The Gibbs/Skyway campus grew out of the Gibbs Junior College which the Board of Public Instruction of Pinellas County opened in 1957 as a segregated black institution. The Gibbs Junior College facility was located only three miles from the then existing all white St. Petersburg Junior College. Pinellas County operated the St. Petersburg and Gibbs Junior Colleges on a fully segregated basis until the early 1960's; the first white student was admitted to Gibbs in 1961 and the first black to St. Petersburg in 1962 (stipulated facts).

By 1965 segregated public education in Pinellas County was being challenged in federal district court. In an effort to settle that case, the Board of Public Instruction, on March 10, 1965, adopted a general plan for desegregating the County's public schools. Pursuant to this plan,

Gibbs Junior College was placed under the administrative control of the St. Petersburg Junior College and ceased to exist as an independent institution. The plan provided that when the Clearwater Campus of St. Petersburg Junior College (then under construction) was completed, Gibbs would be "phased out as a junior college facility." It was stated in the plan that the Board anticipated the closing of Gibbs by September, 1966.

The merging of Gibbs with St. Petersburg pursuant to a school integration plan did not end junior college segregation in Pinellas County. Although school officials did not maintain racial records on the student population, there is no disagreement that after the merger both the Gibbs and St. Petersburg facilities retained clear racial identities. As late as 1967 the student body at Gibbs Campus was predominantly black and the student population at the St. Petersburg campus was predominantly white. The Clearwater Campus was opened by the Junior College for the 1965-66 school year and its student body also was almost all white.

With respect to the racial composition of the faculties of the campuses, it was not until the beginning of the 1965-66 school year, that the first black teacher was placed on the faculty at St. Petersburg and in the 1966-67 school year—the last year of the petitioners' employment—only 2 of the 221 faculty members at the St. Petersburg campus were black. The Clearwater campus opened in 1965 with only one black out of a total faculty of 70. The Clearwater staff was increased to 97 instructors for 1966-67 and only 2 blacks taught at that campus that year (stipulated facts).

With the merger of the Gibbs and St. Petersburg Colleges, black parents were less willing to send their children to the predominantly black Gibbs campus and a serious drop occurred in the enrollment at Gibbs. In an attempt

to combat the stigma of a segregated institution, the Board of Instruction voted on December 14, 1966 to change the name of Gibbs campus to Skyway. It was hoped that by renaming Gibbs, white students would be willing to enroll at the school (stipulated facts). This effort to change the racial image of the campus was unsuccessful, and, coupled with the fact that it had been announced in the desegregation plan that the Gibbs facility was to be phased out, the decline in enrollment continued and the Board finally closed the Gibbs/Skyway facility on March 22, 1967.

The district court found that the closing of the Gibbs/Skyway campus "was not a direct result of desegregation as such (3a)," thereby accepting the respondents' claim that enrollment declines and rising costs led the Board of Instruction's decision. The Court went on, however, to state "it is clear that the effects of *de jure* segregation remain in the college system . . ." and therefore adopted the petitioners' position that the respondents carried the burden of establishing that racial discrimination was not in operation in selection of faculty members to be retained for the 1967-68 school year (5a).

As a result of the closing of the Gibbs/Skyway facility, the respondents were compelled to cut back in the number of instructors to be employed at the Junior College in 1967-68. In the selection process attending this cutback *only* teachers from the black Gibbs/Skyway campus were dismissed from their employment and the burden of the selection process fell amost exclusively on black teachers.

At the close of the 1966-67 school term there were 39 teachers employed at the Gibbs/Skyway campus in instructional capacities. Of this number 31 were black and eight were white. Twenty-three Gibbs/Skyway personnel were reassigned to positions at the St. Petersburg and

Clearwater campuses for the 1967-68 year. Of the 23 reassigned, 19 were black and four were white. All of those reassigned held continuing contracts (i.e. had tenure status) (stipulated facts).

Of the 16 teachers not reassigned for 1967-68, 12 were black and four were white. All of the black teachers who did not receive assignments had tenure status. The four whites were new to the profession and were non-tenured (stipulated facts).

On the other hand no teacher assigned to the St. Petersburg or Clearwater campuses during the 1966-67 term was displaced from his or her position because of the closing of the black campus.[1]

All the petitioners in this case held continuing contracts (positions of tenure under Florida law) with the Pinellas County Board of Public Instruction. With respect to each petitioner, white non-tenured teachers were retained in teaching areas and positions for which the petitioners were qualified (stipulated facts).

The respondents carried out dismissals of tenured black personnel pursuant to Section 231.36 (2), Florida Statutes (16a), which deals with faculty cut backs due to school

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[1] The respondents claimed that three white teachers from the St. Petersburg and Clearwater Campuses were dismissed as of June 1967, thereby opening positions for Gibbs/Skyway teachers. These three, however, were non-tenured and were dismissed for incompetence (stipulated facts). It had been recommended by their department chairmen that they not be retained for the following school year, and the decision to dismiss them had been made before the decision to close Gibbs/Skyway. These teachers would have been terminated regardless of the Gibbs/Skyway closing. On the other hand, the Gibbs/Skyway personnel not reassigned were recommended for reemployment and their dismissals resulted solely from the Gibbs/Skyway closing.

consolidations.[2] The respondents took the position throughout the proceedings below that the closing of the Gibbs/Skyway constituted a school consolidation within the terms of this section and that tenure rights could be ignored when selecting personnel to be retained pursuant to this statute.

The Method of Selection

The district court, in rejecting the petitioners' claims that they were subjected to a racially discriminatory selection process for positions at the Junior College for 1967-68, found that the Dean of Academic Affairs for the Junior College and the deans of instruction from the three campuses jointly determined which teachers would be retained for the following school year. The trial court accepted the testimony from school officials, finding that the deans made the decisions during an all-day evaluation conference at which time each petitioner was evaluated and compared to all other teachers within his or her respective discipline (5a).

Respondents had rested their case primarily on the testimony of the white deans who testified that the evaluation conference occurred on March 27, 1967, five days after the Board of Public Instruction voted to close Gibbs/Skyway. The only Negro dean to take part in the alleged selection process, Johnny Ruth Clarke, Dean of Instruction at Gibbs/Skyway, testified, however that there were two separate evaluations, one on March 27 and the second at some later date. The white president of the College, Michael Bennett, testified that the evaluation ". . . took quite a bit of time.

[2] After the petitioners' dismissals, the Florida legislature renumbered this subsection of the Tenure Act to subsec. (5). Laws 1967, c. 67-387, Aug. 10, 1967. No changes were made in the text of the statute. The lower courts throughout these proceedings referred to the subsection under its original numbering and for purposes of uniformity and clarity, petitioners also will refer to the numbering in effect at the time of their dismissals.

It was not done in a short period. It was done sometime the latter part of March and the early part of April."

The respondents at no time presented written evidence to support the claim that such an evaluation indeed had been undertaken and relied exclusively on the oral testimony of school officials at trial.

The petitioners contended throughout that no such evaluation had been conducted and presented substantial written evidence which refuted the claim that the respondents ever considered displacing white teachers with blacks from Gibbs/Skyway.

The most illuminating objective written evidence in the record is a memorandum from Richard Ernst, the white Dean of Academic Affairs for the Junior College, which was prepared after the alleged March 27 evaluation and after the petitioners were dismissed. This memorandum was dated August 3, 1967 and was directed to the deans of instruction at the three campuses. It was prepared in response to inquiries by the United States Department of Health, Education and Welfare (HEW) concerning the dismissal of black teachers at St. Petersburg Junior College. The petitioners and other black Gibbs/Skyway teachers had filed a complaint with HEW alleging racial discrimination in their dismissals. As a result of this complaint, HEW officials had requested the college to prepare a written report evaluating the complaining teachers with faculty members reemployed for the 1967-68 school year in the complainants' teaching area. In his memorandum Dr. Ernst advised the deans of instruction of the HEW inquiry and that certain information had already been provided to HEW. Dr. Ernst then stated, "One major category that was requested *that we have not completed* is a rating of each of the individuals listed on the attached information" (emphasis added). The individuals referred

to were white instructors in the black complainant instructors' teaching areas. The memorandum noted that Dean Clarke had evaluated Gibbs/Skyway teachers and the white deans were requested to evaluate their staff members using the same criteria that Clarke had used.

A second written document also confirmed that no overall evaluation had been conducted. This document dealt with the treatment of petitioner Roberts. In February 1965, prior to the decision that Gibbs/Skyway was to be closed, petitioner Roberts was advised that she would be transferred to the Clearwater campus for the following school year. The proposed transfer for 1967-68 involved a teacher exchange with a Clearwater instructor going to Gibbs/Skyway. After the decision to close Gibbs/Skyway the Roberts transfer was cancelled. An official memorandum on this matter states that the transfer plans were voided as it would be unfair to the Clearwater teacher who had been a "member of the faculty of that campus since it opened in the Fall of 1965." Such a memorandum of course is totally inconsistent with the claim that an overall evaluation determined which faculty members were to be assigned to the St. Petersburg and Clearwater campuses for 1967-68.

The public statements of school officials also show that there never was an intention of having Skyway personnel displace white teachers. On March 22, 1967, the day the Board officially acted to close Gibbs/Skyway, Dr. Ernst appeared at a special meeting of the faculty of that campus. At that meeting Dr. Ernst read a prepared statement in which he advised Skyway officials of the Board's action. His statement also set forth:

> We want to assure you that we will attempt to place within the Pinellas County School System every member of the faculty and staff of the Skyway campus.

> We will also make every effort to place as many of you as possible, faculty and staff, on one of the other campuses of the College. You are aware of course, that this will depend upon the positions that are available and the competencies required for those positions.

Dr. Ernst also stated that some of the Skyway teachers might wish to transfer to elementary and secondary schools within the County, or those were were eligible might wish to retire or take professional leave. Dr. Ernst did not advise the Gibbs Skyway faculty that they would be treated on an equal basis with faculty at the other campuses. Nor did Dr. Ernst or any other official advise the Skyway faculty that a college wide evaluation would be held to determine which teachers would be retained. Furthermore, school officials did not address faculties at the white campuses to advise them of the imminent personnel cutbacks or to request that they consider transfers or retirement.

The President of the Junior College Michael Bennett, had testified when his deposition was taken January 9, 1968 that the Junior College attempted to absorb as many Gibbs Skyway teachers as possible into openings at the white campuses. President Bennett during his deposition stated that consideration was never given to the possibility of displacing teachers from the white campuses with Gibbs Skyway personnel. Dr. Bennett's deposition testimony also is in conformity with what he told leaders from the St. Petersburg black community who met with him in late April or early May, 1967 to discuss the discharge of black teachers from the Junior College. The black representatives who met with Dr. Bennett testified at trial that the junior college president was specifically asked whether an overall comparative faculty evaluation was conducted

to determine the most qualified teachers to be retained for a limited number of positions at the Junior College. Dr. Bennett replied that no such comparison was made.

The Written Evaluations

While no written record was made of the alleged overall evaluation which the respondents claim constituted the basis of determination of which teachers would be rehired, petitioners were able to extract from school records several written evaluations of St. Petersburg Junior College personnel which were prepared towards the close of the 1966-67 school year.

Pursuant to state law, the college was required to make an annual formal evaluation of each faculty member and to submit a report of that evaluation to the State Board of Education. The evaluation form called for the ratings of "superior," "satisfactory," or "poor" in 18 areas under the general categories of "personnel qualifications," "relations with others," and "teaching (skills) ability." The form also required a "yes" or "no" response on whether the teacher was recommended for reemployment. Evaluation forms were completed for each faculty member and a copy retained in the faculty member's personnel folder.

A second written evaluation was prepared by the respondents in response to the complaint filed with HEW. This evaluation compared the HEW complainants with teachers employed for 1967-68 in the complainants' teaching areas. The report was submitted to HEW on September 15, 1967. The HEW evaluation listed for those teachers evaluated the number of years of experience, whether they had tenure, and a rating based on criteria of "good," "fair," and "poor." The categories good, fair and poor in the HEW evaluation were considered by the respondents to be similar or equivalent to the superior, satis-

factory, and poor categories respectively, in the state evaluation forms.

The final written report was prepared by Dean Clarke of the Gibbs/Skyway campus in February 1957 and rated the faculty members of that campus on a good, fair and poor basis. All the black instructors who rated on the HEW evaluation received the same evaluation they had been given on the Gibbs/Skyway evaluation of February. Three of the petitioners Ollie Phipps, Essie Roberts and William Smith received poor rating on these evaluations.

These written reports clearly established that the respondents engaged in a devious effort to justify dismissals of black teachers by giving them poor ratings in the special evaluation conducted by Clarke and the one for HEW. This is evident from the fact the poor ratings three petitioners received differed substantially from the ratings they received on their 1967 state evaluations. All of the petitioners received what can be characterized as no less than satisfactory ratings on their state forms.

To illustrate this variance, petitioner Phipps was rated poor on the Clarke evaluation and the evaluation submitted to HEW. On his state evaluation, however, he received three superior, 13 satisfactory and no poor ratings. The same pattern is true of the other petitioners who received poor ratings on the Clarke and HEW reports. On the other hand, deans from the white campuses testified that the white teachers who were rated on the HEW evaluation received ratings which reflected the ratings that these teachers obtained on their 1967 state evaluations.

The written teacher evaluations petitioners introduced in evidence clearly established that the petitioners were subjected to a highly questionable rating process when compared to white teachers.

a. *Ollie Phipps*

Petitioner Phipps taught Biology at the Gibbs/Skyway campus. He had been an instructor at Pinellas County Junior College system since 1957 when he went to work at the Gibbs Junior College. He taught continually at Gibbs and later at Gibbs/Skyway until his dismissal in June 1967.

As stated above, Phipps received satisfactory and superior ratings on his state form and a poor rating on the Gibbs/Skyway and HEW evaluations. When Phipps' state form for 1967 is compared with the state forms of that year of two white instructors who also taught Biology during 1966-67 and who were hired the following year it is clear that Phipps' evaluation is the superior of the three.

In addition, in Phipps' case the respondents went outside the system to hire two new teachers to teach Biology for the 1967-68 school year. Both of these new instructors were white and were non-tenured. This action was taken despite the fact that Phipps was officially recommended for reemployment for 1967-68 (stipulated facts).

b. *Esther B. Harris*

Petitioner Harris was a member of the Department of Business Administration at the Gibbs/Skyway Campus and taught typing, shorthand and business writing during 1966-67. She qualified to teach skills that led to secretarial positions. She taught at Gibbs/Skyway until discharged in June 1967.

Petitioner Harris received what could be characterized as a satisfactory rating on her 1967 state evaluation form. A comparison of her state form with the forms for white instructors who also taught business skills and who were retained by the Junior College for the 1967-68 school year,

demonstrates that Harris' evaluation is clearly superior to the evaluations of two white instructors. Harris' evaluation was at least equal to the evaluations for two other white instructors who lacked tenure.

Harris' higher rating also was borne out by the HEW report. On that report Harris was rated "fair". One of the white instructors Dorothy Struckmeyer, was rated "poor" on this report. Several other white instructors who were non-tenured were also rated "fair." At the trial the respondents in fact stipulated that petitioner Harris was a superior teacher to Struckmeyer. Struckmeyer's 1967 state evaluation was generally poor and she was not recommended for reemployment in 1967-68.

The respondents attempted to justify the retention of Struckmeyer for the 1967-68 school year by asserting they were bound to do so by a contract entered into with the Pinellas County Classroom Teachers Association. The alleged contract was merely a statement signed by Struckmeyer and her department chairman. The statement created no legal obligations and was not a contract. It reads in full:

> The undersigned agree without reservation, mental or otherwise to function within the rights and responsibilities of each, one as instructor and one as department chairman, beginning now and continuing in the future, with no reference to the past, under the same relationship expected between a new instructor and his department chairman, each performing his duty and discharging his responsibility to the best of his ability.

The trial court avoided this anomolous situation by simply failing even to mention the reappointment of Struckmeyer (6a-7a).

c. *Mary O. Brown*

Appellant Brown was a member of the faculty at Gibbs/Skyway from 1960 until her dismissal in June, 1967. During the academic year 1966-67, she was assigned to the Department of Social Sciences and taught courses in geography, government and education.

Although petitioner Brown taught Social Sciences, on the respondents report to HEW she was listed only as an instructor of education. She received a "good" rating on the HEW evaluation and her state evaluation form for 1967 showed she was a satisfactory to superior instructor that year.

Jessie Pugh was a white non-tenured instructor who also taught education courses during 1966-67 and was rehired for the 1967-68 school year. While Brown rated "good" on the HEW evaluation, Pugh received only a "fair" rating on that document. The respondents presented no adequate justification for the dismissal of petitioner Brown and the retention of Jesse Pugh. The trial court avoided the problem presented by these evaluations on the HEW report by not even discussing petitioner Brown's case in its opinion.

d. *William A. Smith*

Petitioner Smith was employed at Gibbs and later at Gibbs/Skyway from 1968 until his dismissal in June 1967. He was in the Department of Social Sciences and taught social studies and education.

Smith was listed on the report to HEW as an instructor in education and religion even though he did not teach courses in religion at the Junior College. Smith received a "poor" rating on both the Clarke and HEW evaluations,

although he received all satisfactory and superior ratings on his 1967 state evaluation form.

A comparison of petitioner Smith's 1967 state evaluation form with the 1967 form for a white instructor, who was retained to teach religion the following year, shows that both evaluations were practically identical. The white instructors did not have tenure and had substantially less teaching experience than Smith. When Smith's state form is compared with education teachers his evaluation is virtually identical to that of Jessie Pugh's noted above. Pugh, however, lacked tenure, having taught for only one year in Pinellas County.

e. ***Eloise Perkins***

Petitioner Perkins was employed at Gibbs and later Gibbs/Skyway from 1961 until June, 1967. She had been with the Pinellas County School System continually since 1926. Throughout her employment at the Junior College she worked as a student counselor in the Personnel Department.

Petitioner Perkins was listed on the HEW evaluation as an English teacher. She was not, however, given a rating on that report. Instead a notation was placed by her name explaining the lack of an evaluation which read:

> Mrs. Perkins does not have a graduate degree, which is required of all faculty members of St. Petersburg Jr. College who instruct in an academic area such as English.

Petitioner Perkins had had some training in English and taught English at the secondary education level. Her only English teaching at Gibbs involved one course in 1961—thereafter her work was exclusively in counselling.

During 1967, but prior to announcement that Skyway had been closed, Perkins had been told by school officials that she would be transferred to the Clearwater campus for the next school year to serve as a student program planner. Program planners at the Junior College do not require graduate degrees and Perkins was qualified for the position. Notwithstanding her employment in counselling related activities, the respondants did not even claim that Perkins was compared with program planners from the white campuses after Gibbs/Skyway was closed.

The district court did not discuss Perkins' case in its opinion.

f. *Essie Roberts*

Petitioner Roberts taught Sociology at Gibbs and later Gibbs/Skyway from 1961 until June, 1967.

As noted above, it had been determined prior to the decision to close Gibbs/Skyway, that Roberts would be transferred to the Clearwater campus. At least prior to the decision to close Gibbs/Skyway it was clear that Roberts was a highly qualified instructor. Notwithstanding, Roberts was rated as "poor" in the Clarke and subsequently the HEW evaluations. On her 1967 state form, however, she obtained a generally satisfactory rating.

If Roberts' state form evaluation of satisfactory (or fair) is compared with the rating given on the HEW evaluation to one of the white instructors retained to teach sociology for 1967-68 the two ratings would be the same. The white instructor in question was given a "fair" rating on the HEW evaluation, but did not have tenure and had considerably less teaching experience than Roberts.

Reasons for Granting Writ

1. This case presents important questions with respect to proper procedural protections for black educators who are confronted with dismissals from teaching positions as a result of school desegregation.

This Court has made it abundantly clear that dual school systems must be dismantled immediately and that complete faculty desegregation is an essential aspect of the process. *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968); *Alexander* v. *Holmes County Bd. of Educ.,* 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.,* 39 L.W. 4437, decided April 20, 1971. However, the elimination of dual school systems jeopardizes the positions of black educators. With the closing of "black" schools, black teachers are exposed to the increased likelihood of dismissal because of their race.

In order to minimize the obvious threat to black teachers which accompanies desegregation, the federal courts have attempted to insure procedural protections for black teachers when desegregation necessitates faculty cutbacks. The courts have required school administrators to conduct overall impartial faculty evaluations prior to selecting which personnel shall be dismissed because of the closing of black schools and the selection must be made on the basis of merit. These procedural protections have not, however, proven adequate and it is now unfortunately evident that the conversion to unitary systems has had a devastating impact on black educators.

The National Education Association (NEA) recently documented what has happened to black and white educators in school districts in the Fifth Circuit since the Fall of 1968. Relying exclusively on figures reported to the United

States Department of Health, Education and Welfare (HEW) by the school districts themselves, NEA demonstrated that black educators, and particularly black principals, have borne burdens incident to desegregation in numbers greatly disproportionate to any burdens borne by white educators.[3]

The NEA report revealed that the ranks of black teachers were disproportionately reduced in school districts in the Fifth Circuit (excluding districts in Texas) between 1968 and 1970. NEA found that statewide totals uniformly established that the percentage of black teachers in the total teaching force had declined during this period. NEA also found that these statewide trends were widespread, affecting almost all of the districts reporting to HEW. NEA stated:

> The data revealed that between 1968 and 1970, 216 school districts, or about 52 percent of the reporting school districts, decreased by 5 percent or more the number of black teachers on their faculties. The decrease was 15 percent or more in 128 districts.[4]

In addition, NEA's report indicates that in the case of most of the districts which reported decreases in black faculty, these same districts also reported an increase in the number of white teachers. Thus, of the 216 districts in the Fifth Circuit which reported decreases in black faculty by 5 percent or more between 1968 and 1970, 141 of these districts showed increases in the number of white teachers, 5 maintained the same number of white teachers and 1 reported incomplete data for white teachers. Only 69 of

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[3] NEA's data on the impact of desegregation on black educators was reported in a brief amicus submitted to the Court of Appeals for the Fifth Circuit in *United States* v. *Georgia, No.* 30338.

[4] *Id.* at p. 9.

the 216 districts registered a decline in the number of white faculty, but NEA points out that in many of these districts there was reported sharp disproportionate decline in white students, indicating "white flight".[5]

NEA reported separately on HEW data on black principals and concluded that the impact of desegregation on black principals is even more ominous than on black teachers. In four states surveyed (Florida, Georgia, Louisiana, Mississippi) for the period 1968 through Fall 1970, the data showed that one out of every five black principalships was eliminated. On the other hand, the number of white principalships increased in the same period. NEA concluded, "The short of the matter is that black principalships are being eliminated in gross while white principals grow in number. In the four states reporting data to HEW, black principalships declined by 21 per cent between Fall 1968 and Fall 1970 while white principalships increased by 4 percent."[6]

NEA cautioned that the problem was probably even more severe than indicated by the statistics it derived from HEW records. The report notes that many school districts did not report to HEW and those districts which were the subject of federal fund cutoffs by HEW—the most recalcitrant of districts—were not included in the analysis.

There can be no doubt that the elimination of segregated school systems is inflicting incredible hardships on black educators. It is also clear that if this trend is to be halted, and hopefully reversed, then additional procedural protections must be instituted immediately.

2. In an effort to halt the further decimation of the ranks of black educators as a result of faculty cutbacks

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[5] *Id.* at p. 21.
[6] *Id.* at p. 42.

accompanying school desegregation, the federal courts have imposed upon school officials the burden of establishing that black educators displaced in such cases, have been "judged by definite objective standards with all of the teachers in the system for continued employment . . ." *Wall* v. *Stanley County Board of Education,* 378 F.2d 275, 276 (4th Cir. 1967).[7] To insure that selections are based on objective standards, the courts have required that a fair and impartial evaluation of all faculty members be conducted prior to determination as to which teachers will be retained.

The district court in the instant case concluded that the respondents conducted a fair and honest overall evaluation prior to dismissing the petitioners. In making this finding, the district court relied exclusively upon a series of self-serving representations at trial that an *oral* overall evaluation was conducted. These representations were uncollaborated as the school administrators were unable to present written documentation to support the claim that a schoolwide evaluation had in fact been conducted.

The district court made its findings in the face of the petitioners' presentation of an official memorandum prepared by the Dean of Academic Affairs which stated that no evaluation of white faculty members had been conducted prior to the dismissals. The trial court also discounted the before trial public statements of school officials that there never was any intention to displace teachers at the white

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[7] See also, *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 900 (5th Cir. 1966), *affirmed on rehearing en banc,* 380 F.2d 385, *cert. denied,* 389 U.S. 840 (1967); *Chambers* v. *Henderson City Board of Education,* 364 F.2d 189 (4th Cir. 1966); *Smith* v. *Board of Education of Morrilton School District No. 32,* 365 F.2d 770 (8th Cir. 1966); *Franklin* v. *County School Board of Giles County,* 360 F.2d 325 (4th Cir. 1966); *Rolfe* v. *County Board of Education of Lincoln County, Tennessee,* 391 F.2d 77 (6th Cir. 1968); *North Carolina Teachers Association* v. *Asheboro City Board of Education,* 393 F.2d 736 (4th Cir. 1968).

campuses with Gibbs/Skyway personnel, the position taken by the Junior College president when met with community leaders shortly after the decision to close Gibbs/Skyway and the position he reiterated at his deposition in January 1968. Furthermore, the trial court discounted the contradictory testimony of school officials concerning the alleged overall evaluation and the fact that Gibbs/Skyway personnel was advised by the Dean of Academic Affairs that possible transfers to the white campuses would "depend upon the positions that are available."

The petitioners contended before the Fifth Circuit that, because of the importance attributed to objective teacher evaluations where faculty cutbacks attend school desegregation, it was improper for the district court to rely exclusively upon representations by the school officials that oral evaluations were conducted. It was argued that the "objective standards" safeguard could have meaning to black personnel confronted by faculty cutbacks only if the alleged evaluation process was recorded in writing and that after the fact explanations by school administrators represent no substitute for concrete written evaluative reports prepared when the final decisions are actually reached. The Fifth Circuit in its opinion failed to respond to this argument and merely applied the clearly erroneous rule notwithstanding the fact that petitioners had raised questions with respect to procedural irregularities (12a).

The presence of written evidence to support a claim that a school wide evaluation was conducted is critical to a meaningful judicial challenge and review. Without such documentation, complainants in cases of this nature as a practical matter are faced with the onerous burden of attempting to impeach the testimony of school administrators who uniformly assert they undertook a fair review before selecting those to be reemployed. The existence of a written

evaluation report, which may also constitute a self serving justification for discriminatory employment practices, nonetheless enables the aggrieved parties to determine precisely the reasons for their dismissals and the reemployment of whites. Written reports will not insure that a racially discriminatory purpose will be uncovered, but such reports certainly will facilitate cross-examination and will enable complainants to mount meaningful challenges.

In the instant case for example, had the district court been compelled to focus on the written evaluations, the discriminatory aspects of the respondents' selection process would have been evident. The written evaluations petitioners introduced into evidence established that the petitioners were displaced by white teachers with inferior ratings. In fact, the report the respondents submitted to HEW showed two of the petitioners with higher ratings than white teachers retained to teach in these petitioners' teaching fields. A requirement that the evaluation process be recorded in writing is a minimum step necessary towards insuring that objective standards are actually applied in this difficult area.

This Court is not unaware of the difficulty involved in unmasking invidious racial discrimination. Governmental officials who attempt to deprive minority citizens of equal rights invariably seek to camouflage their discriminatory purpose in an otherwise valid exercise of police powers. See e.g. *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960); *Louisiana* v. *United States,* 380 U.S. 145 (1965). It is not unique for the courts to promulgate evidential rules in order to facilitate the uncovering of discriminatory intentions and to protect minority citizens from prejudicial public actions. See *Norris* v. *Alabama,* 294 U.S. 587 (1935) (absence of black jurors establishes *prima facie* case of racial discrimination).

The district court's willingness in the instant case to accept the respondents' representations that an overall evaluation was fairly conducted, notwithstanding the existence of written evidence to the contrary, confirms the need for a redefinition of the procedures to be followed where faculty cutbacks are necessary because of desegregation. This need is underscored by the hardship that is being inflicted upon black educators—and upon black students who are deprived of racially mixed faculties—as a result of the effort to eliminate vestiges of dual school systems. The removal of black educators from school systems engaged in programs of desegregation continues notwithstanding protestations by school administrators that "objective standards" are being applied; this problem merits this Court's consideration.

3. Protection of black educators in districts undertaking desegregation turns upon the application of objective standards of evaluation in the selection process of teachers to be retained for a limited number of positions. The goal of a truly objective selection process in such cases has been, however, an elusive ideal and discrimination against black personnel continues to be widespread.

The problem relates partially to the fact that the rating of teaching personnel involves subjective elements such as determinations as to a teacher's attitude, ability to relate to students, academic skills, etc. Thus, when school administrators determine that a particular white teacher is superior to a particular black teacher, the black teacher faces a difficult, if not overwhelming task in attempting to disprove the correctness of that determination. Administrators always will be able to dredge up something in a faculty member's past to justify a poor rating. And while white administrators persist in claims that "objective" evaluation stan-

dards are being applied, the numbers of black faculty are steadily reduced in southern school districts.

The subjective nature of the selection process which resulted in dismissal of faculty from the black campus in the instant case is dramatically demonstrated by the respondents' own evaluation report prepared for HEW in response to the complaint filed under Title VI of the Civil Rights Act of 1964. This report showed that black teachers who lost their jobs because of the closing of the Gibbs/Skyway were given higher ratings on the HEW report than were white instructors in the same teaching fields who were reemployed. Thus, petitioner Brown, who was classified as an instructor in education, was rated "good" in the HEW report while a white non-tenured instructor in education reemployed in 1967-68 was rated only "fair." Petitioner Harris who was classified as an instructor in business skills and was rated "fair" in the HEW report, was discharged while a white instructor also in business skills who was reemployed for 1967-68 received a "poor" rating.

The respondents failed to explain this apparent discriminatory treatment. With respect to petitioner Brown they merely asserted that the best teacher was retained without commenting on how a fair teacher is better than a good teacher. In the case of petitioner Harris the respondents pointed to the alleged "agreement" between the white instructor and her department chairman, (see p. 14, *infra*). The document in question is clearly not a contract. It creates no rights or obligations and constitutes a poor attempt to camouflage respondents' true intentions. The petitioners argued in the courts below that the rehiring of white instructors with inferior evaluations was direct evidence of the respondents' discriminatory procedures. It also demonstrates, however, the total subjectivity of the respondents' evaluation procedures.

Similarly inadequate explanations were given by the respondents for the fact that some of the petitioners received poor ratings on the HEW report, while receiving satisfactory to superior ratings on their 1966-67 state evaluation forms. The only justification presented for these discrepancies in evaluative ratings was the claim that the state evaluation forms were inadequate for providing an accurate evaluation of the petitioners' teaching abilities. If the petitioners' teaching skills were as inadequate as claimed, however, one would expect that they would have been rated as "poor" under such categories on the 1967 form as "knows subject matter," "takes action to improve himself," "uses instructional materials and lesson plans effectively," "develops pupil interest and eagerness to learn," etc. Whatever deficiencies may have existed with the 1967 state form, these deficiencies were not so great as to have prevented the respondents from reflecting a poor personnel evaluation had they so desired. The fact is that the state evaluation did not entail comparing black teachers with whites. And this fluctuation in ratings confirms the totally subjective nature of the respondents' evaluation process.

Because of the weakness in the respondents' arguments, they further attempted to justify their actions by presenting testimony of minor events and infractions which had occurred over the years that these teachers had worked in Pinellas County. In every instance the alleged infraction dated from long before the closing of the Gibbs/Skyway facility. For example, the respondents, in an effort to justify the poor rating given to petitioner Smith, introduced evidence of a "poorly handwritten examination" Smith prepared in January 1958. Also, petitioner Roberts was criticized by a white department chairman from the Clearwater campus on the grounds that white students

had complained about term papers in her class. None of the minor incidents raised by the respondents had led to any disciplinary or remedial action at the time they occurred.

The respondents, on the other hand, did not subject white faculty members to variations in ratings. The deans from the white campuses testified that the white teachers received evaluative ratings at the alleged overall evaluation meeting on March 27, 1967 which corresponded to the ratings they received on their 1967 state forms. Thus at a time when faculty members from the black campus were to be fully merged for the first time with the faculty members of the white campus, they, and they alone, were subjected to a unique and stringent evaluation to test their competency to teach at the white campuses. The fluctuation in terms of evaluative ratings for various purposes confirms the total subjectivity of the selection process when blacks are tested against whites. Compare *Louisiana* v. *United States, supra; Cyprus* v. *Newport News,* 375 F. 2d 648 (4th Cir. 1967); *Chambers* v. *Henderson City Board of Education, supra.*

The facts in this case, as well as the documentation on the diminishing number of the faculty in southern school districts points clearly to the fact that there is little hope for objectivity when southern school administrators must choose between black and white faculty in desegregation cases. A more precise standard or formula is needed to insure a nondiscriminatory selection process problem than the mere requirement of "an overall evaluation." It may well be that the only means of insuring that racial discrimination and prejudice does not enter the faculty selection process where teachers are being chosen for reemployment in desegregation situations, is to require selection exclusively on the basis of seniority and length of tenure.

In any event, the problem warrants this Court's concern and review.

4. The District Court in ruling upon the claims set forth by petitioners refused to follow the directions of this Court to hear and decide pendent non-federal questions which are factually so interrelated to a substantial federal question that they may be viewed as being a separate ground of the same cause of action. *Hurn* v. *Oursler*, 289 U.S. 238 (1933); *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966); *Rosado* v. *Wyman*, 397 U.S. (1970).

The pendent state claim was set forth in a separate count of the complaint. Petitioners charged respondents with violating their state teacher tenure contracts and asserted that the district court had pendent jurisdiction over this claim. Petitioners' tenure rights were derived from Section 231.36 of the Florida Statute (14a) which states that teachers with continuing contracts shall be entitled to continue in their positions without the necessity of annual reappointment. Petitioners allege that their dismissals violated rights secured to them under this statute and constituted a breach of their individual continuing contracts of employment.

The violations of state law arose from the misinterpretation and wrongful application of Section 231.36 (2), Florida Statutes, which the respondents relied upon to justify the dismissals. This section constitutes an exception to the tenure act and sanctions the discharge of tenured teachers in the event of faculty cutbacks necessitated by school consolidations. This exception specifically applies, however, only to situations where administrators must "choose from among its personnel who are on *continuing contracts* as to which should be retained . . ." (emphasis added) (16a). The sub-section does not require

teachers with tenure and holding continuing contracts to match their qualifications against teachers on non-continuing contracts merely because a school consolidation occurs.

The respondents attempted to explain their violation of petitioners' tenure rights by asserting that the exception contained in Section 231.36 (2) suspends all of the tenure protections under 231.36 and in cases of consolidation non-tenured teachers may be retained at the expense of tenured teachers. This interpretation of the provisions in question, however, is contrary to the clear meaning of the language involved. The tenure law is to be applied in such a manner that tenured teachers are to retain their positions in all cases over non-tenured personnel and the exception with respect to school consolidation only permits school officials to discharge those on tenure status in the event that additional cutbacks are required after all non-tenured teachers have been discharged.

Not only is this the clear interpretation of the language of the Florida Statute, but it also conforms with the general approach to and interpretations of teacher tenure laws. In the absence of express authority to the contrary, courts have interpreted tenure laws as barring school administrators, who are compelled to cutback on faculty members, or to discharge teachers in a specific discipline, from dismissing tenured teachers while retaining teachers without tenure. The general rule is as follows:

> In the selection of the teacher or teacher to be dismissed or suspended upon a reduction in the number of teachers employed or upon the abolishment of a position, class or activity, and in the absence of any express statutory basis for such selection, it has been held that the school board cannot dismiss or suspend

> a tenure teacher, at least where the non-tenure teacher is retained to teach in the same position or in the same general area of competency, interest or training, as the tenure teacher. 100 A.L.R. 2d 1184.

This rule has been applied uniformly by all state courts which have been called upon to rule on this question.[8]

That is not to say that a tenured teacher may never be discharged. Most tenure acts, including Florida's, provide that tenured personnel may be dismissed for specific causes (usually for incompetency, neglect of duty, etc.) after appropriate due process hearings. See Section 231.36(6) Florida Statutes. Cutbacks necessitated by consolidations or drops in enrollments cannot be used to avoid tenure rights or justify dismissal of tenured personnel while non-tenured are retained.

There is no dispute, and the respondents readily admit, that white non-tenured faculty were re-employed to teach in 1967-68 in each of the petitioners' teaching fields. This disregard of tenure rights violates Florida law and constitutes a breach of the petitioners' continuing contract rights.

Furthermore, with respect to petitioner Phipps who taught Biology at the Gibbs/Skyway Campus, the respondents went outside the system to hire two new white instruc-

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[8] See e.g. *Watson* v. *Burnett*, 216 Ind. 216, 23 N.E. 2d 420 (1939); *Seidel* v. *Board of Education of Ventnor City*, 110 N.J.L. 31, 164 A.901, *Aff'd* 111 N.J.L. 240, 168 A.297 (1933); *Davis* v. *Gray*, 20 Colo. App. 2d 403, 84 P.2d 534 (1938); *Daily* v. *Mendenhall*, 98 Ind. App. 699, 183 N.E. 561 (1933); *Gassen* v. *St. Charles Parish School Board*, 199 La. 954, 7 So. 2d 217 (1942); *Board of Education of Town of Kearny* v. *Horan*, 11 N.J. Misc. 751, 168A. 132 (1933); *Pickens County Board of Education* v. *Keasler*, 263 Ala. 231, 82 S. 2d 197 (1955); *Swisher* v. *Darden*, 59 N. Mex. 511, 287 P.2d 73 (1955); *Board of School Trustees of Gunning Bedford Jr. School District No. 53* v. *O'Brien*, 190 A.2d 23 (Del. 1963); *Hensley* v. *State Board of Education*, 71 N. Mex. 182, 376 P.2d 968 (1962).

tors to teach Biology for the 1967-68 school year. The respondents attempted to justify this action on the ground that petitioner Phipps was rated a poor teacher. However, they made no attempt to proceed against Phipps under Section 231.36(6) of the tenure law under which an incompetent faculty member who has tenure may be discharged. Needless to say, the procedure which was followed did not afford him even the remotest semblance of due process. No reasonable interpretation of the statute permits such a flagrant abuse of the requirements for due process contained therein or those requirements which have evolved in the general jurisprudence on this subject.

Although respondents initially relied exclusively on Section 231.36(2) pursuant to which dismissals were made and so advised the petitioners in notification letters of dismissal, at trial the respondents attempted to strengthen their position by asserting that the petitioners' positions had been discontinued. Section 231.36 provides that a tenured teacher is entitled to reappointment to his position "until such time as the position is discontinued" and respondents argued that the dismissals also were justified under this language of the tenure law.

An obvious problem with this argument is that a court in reviewing an administrative action is bound to consider the propriety of that action solely upon the grounds and justifications invoked by the administrative body itself.[9] Even if the "discontinuance of positions" contention had been timely asserted, however, it could not justify respondents' actions as the petitioners' positions were *not* discontinued. In effect, respondents are contending that each petitioner had tenure

[9] *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966). It flies in the face of due process to affirm on one ground an action which was based on a totally different ground. Cf. *Cole* v. *Arkansas*, 333 U.S. 196 (1948) (conviction obtained under one section of a state statute cannot be affirmed under a different section).

rights only with respect to a particular position at the Gibbs/Skyway campus and, with the closing of that facility, each of these positions was abolished. Such an interpretation would afford teachers virtually no protection at all under a tenure system. The specific classroom assignment of an unwanted teacher could be terminated and the tenure provisions of his contract would thereupon become meaningless. The respondents' interpretation of the word "position" is erroneous as the courts have without exception defined "position" in a much broader sense so as to include the general category of teaching assignment rather than an assignment to a particular classroom. See 100 A.L.R. 2d 1141, 1172; *Florida ex rel. Slater* v. *Martin,* 142 So. 2d 767 (Flo. 1962); *State* v. *Ging,* 7 N.W. 2d 554, 562-63 (Minn. 1942).

The district court avoided the obvious violations of the tenure law by simply not ruling on petitioners' pendent claims. The district court's opinion is silent on this question, not even mentioning the fact that non-tenured teachers were retained over tenured personnel. On appeal the petitioners strenuously challenged the district court's failure to respond to this issue and exercise pendent jurisdiction over the non-federal state claim. In response the Fifth Circuit noted that the argument was raised, set forth the statutory provisions involved, and upheld the district court by merely noting: "[T]he trial court specifically held that the procedures comported with constitutional standards and the law" (12a). The Fifth Circuit then stated it was satisfied that the trial judge had in fact applied "the plain words and the clear intent of the quoted statutes and he did not abdicate any duty imposed upon him by the doctrine of pendant jurisdiction" (13a).

The Court of Appeals, like the district court before it, was unable, however, to deal with the plain meaning of the

Florida Teachers Tenure Law and therefore did not discuss the fact that tenured teachers were displaced by non-tenured teachers—a fact stressed repeatedly by petitioners in their brief and argument before the court. Notwithstanding the Fifth Circuit's effort to rectify the district court's failure with respect to the state claim, it is clear that neither court addressed itself to the clear violation of state law which exists in this case.

Any doubts that may have existed with respect to the duties or responsibilities of lower federal courts concerning the exercise of pendent jurisdiction should have been removed by this Court's rulings in *Gibbs* and *Rosado* v. *Wyman*. Mr. Justice Brennan, for the court in *Gibbs*, clarified the pendent jurisdiction doctrine by stating that:

> . . . the state and federal claims must derive from a common nucleus of operative fact. But if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding then, assuming substantially of the federal issues there is *power* in federal courts to hear the whole. *United Mine Workers* v. *Gibbs, supra* at 725.

In *Gibbs* this Court made clear that pendent jurisdiction should be exercised where ". . . considerations of judicial economy, convenience and fairness to litigants . . ." indicate that the related state and federal claims should be considered together in one proceeding. *Id.* at 726. The court specifically noted that the doctrine is a natural consequence of the policy of joining claims, parties, and remedies so as to expedite judicial proceedings and insure the prompt resolution of court actions. *Id.* at 724.

The clear intent of *Gibbs* is to restrict the discretion of lower courts to refuse consideration of pendent state claims

in federal cases. And most lower courts have properly read *Gibbs* as limiting judicial discretion in this area. See e.g. *Wilson* v. *American Chain & Cable Company,* 364 F.2d 558 (3rd Cir. 1966); *Stone* v. *Stone,* 405 F.2d 94 (4th Cir. 1968); *Ritchie* v. *United Mine Workers,* 410 F.2d 827 (6th Cir. 1969).

The instant case is one where both *Gibbs* and *Rosado* v. *Wyman* dictate that a trial court should exercise pendent jurisdiction. Petitioners set forth in a separate count of their complaint a state claim under the Teacher Tenure Act. Their claim arose from the same operative set of facts of their federal claims, the common nucleus of operative facts being the dismissal of petitioners from teaching positions at the St. Petersburg Junior College. The petitioners were dismissed in spite of their tenured status, thereby adding a state claim (for violation of the Teacher Tenure Statute) to their claim that their dismissals were motivated by considerations of race and, therefore in violation of the Fourteenth Amendment of the Constitution. As to the federal claim, the district court, as early as December 28, 1967 in ruling on a petitioners' motion for the convening of a three-judge court, held that the petitioners' federal Fourteenth Amendment claims were sufficient to confer jurisdiction. Because of a congested calendar, the trial was not held until April 1969; the district court decision was not handed down until March 1970.

This clear interrelationship of the state and Federal claims, as well as the protracted nature of the proceedings in the district court, should have led the lower court to resolve all the petitioners' claims which arose out of their dismissals from the junior college. This is true even though the district court resolved the federal issues against the petitioners. *Hurn* v. *Oursler, supra.* The instant case represents a classic example of circumstances under which fed-

eral courts should exercise pendent jurisdiction.[10] The district court's failure to respond to the state claims and the Fifth Circuit's affirmance indicates a clear need for this Court to clarify the nature and purpose of pendent jurisdiction and to delineate further the extent to which district courts are bound to rule upon state law claims where these claims are clearly interrelated with substantial federal issues.

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[10] While it is true that the Florida courts have not ruled upon the issue of whether tenured teachers may be dismissed while non-tenured teachers are retained when a consolidation warrants application of Section 231.36(2), this fact would not justify the district court from abstaining from ruling on the issue until the local courts have had the opportunity in an appropriate proceeding to pass upon the matter. This court declared in *Allegheny County* v. *Mashuda Company*, 360 U.S. 185, 188-189 (1959) that:

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

Furthermore "[t]he doctrine . . . contemplates that deference to state court adjudication only be made where the issue of state law is uncertain . . ." *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965). And see *Propper* v. *Clark*, 337 U.S. 472, 489-492 (1949).

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for writ of certiorari be granted.

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